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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BEVERLY JEWETT,

Plaintiff and Appellant,

v.

CAPITAL ONE BANK et al.,

Defendants and Respondents.

B179794

(Los Angeles County
Super. Ct. No. BC253750)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Paul Gutman, Judge. Affirmed.

Law Offices of Barry L. Kramer and Barry L. Kramer for Plaintiff and Appellant.

Morrison & Foerster, James F. McCabe, James R. McGuire, and Seta Arabian for
Defendants and Respondents.

In 2001, appellant Beverly Jewett (Jewett) filed this class action against defendants and respondents Capital One Bank and Capital One, F.S.B. (collectively Capital One), contending that Capital One engages in misleading and deceptive credit card marketing practices. Capital One responded to the complaint by filing a demurrer, motion to strike, and special motion to strike pursuant to Code of Civil Procedure section 425.16,¹ California's anti-SLAPP² statute.

The trial court granted Capital One's anti-SLAPP motion, and Jewett appealed. On November 25, 2003, we reversed the trial court's order, concluding that Jewett's claims against Capital One were not subject to the anti-SLAPP statute. (*Jewett v. Capital One Bank* (2003) 113 Cal.App.4th 805, 815.) On remand, the trial court considered Capital One's previously filed demurrer. It sustained that demurrer without leave to amend on the grounds that Jewett's claims were preempted by federal law, namely the Fair Credit Reporting Act (FCRA).

Jewett challenges this trial court order arguing that her claims are not federally preempted. We affirm. We need not determine whether Jewett's claims are federally preempted. As a matter of law, Jewett has not, and cannot, state a claim for deceptive or misleading marketing practices.

FACTUAL AND PROCEDURAL BACKGROUND

The Complaint

On July 6, 2001, Jewett filed this class action against Capital One, alleging that Capital One engages in misleading and deceptive credit card marketing practices. Specifically, she alleged that Capital One mailed solicitations for credit cards, stating that the recipient was "pre-approved" for a credit line of "up to \$2,000" or for a "Gold" credit

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

² SLAPP is an acronym for strategic lawsuit against public participation. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 813, overruled in part on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

card, while Capital One knew all along that many of the recipients would only be issued a card with a \$200 credit limit. The complaint averred that such solicitations were misleading and that Capital One had “advertis[ed] credit services while intending not to sell them as advertised.” Based upon these allegations, the complaint alleged violations of California’s Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) and Consumers Legal Remedies Act (Civil Code, § 1750 et seq.).

The Anti-SLAPP Motion and Order for Attorney Fees

In response, Capital One filed a demurrer, motion to strike (§ 436), and anti-SLAPP motion (§ 425.16). On September 24, 2002, the trial court granted Capital One’s anti-SLAPP motion and dismissed Jewett’s action. The trial court placed Capital One’s demurrer off calendar.

Following the trial court’s ruling, Jewett appealed the trial court’s order and judgment of dismissal.

Appeal from Order Granting Anti-SLAPP Motion and Proceedings on Remand

On November 25, 2003, we reversed the trial court’s judgment, holding that Jewett’s claims against Capital One did not fall within the scope of the anti-SLAPP statute. (*Jewett v. Capital One Bank, supra*, 113 Cal.App.4th at p. 807.) The matter was remanded to the trial court.

Capital One’s Demurrer

Following remand, in July 2004, Capital One renoticed its demurrer to Jewett’s class action complaint. In its supporting memorandum of points and authorities, Capital One argued that Jewett’s claims were preempted by the FCRA. Specifically, the solicitation Jewett received in the mail constitutes a “firm offer of credit,” expressly permitted by the FCRA. Because Congress has established a pervasive regulatory scheme governing “firm offers of credit,” it has expressly preempted any state regulation of the subject. Similarly, Capital One averred that the entire action is preempted by the regulations promulgated by the Office of Thrift Supervision. (12 C.F.R. § 560.2(a).) Alternatively, Capital One contended that the solicitations were not deceptive or misleading. Finally, as for the Consumers Legal Remedies Act (CLRA) claim, the statute

is inapplicable because an extension of credit is not a “good” or “service,” as those terms are defined by the CLRA, and Jewett has not suffered any damages under the CLRA.

Over Jewett’s opposition, the trial court sustained Capital One’s demurrer without leave to amend. Relying in large part upon *Kennedy v. Chase Manhattan Bank USA, NA* (5th Cir. 2004) 369 F.3d 833 (*Kennedy*), it concluded that the FCRA (15 U.S.C. § 1681t(b)(1)(D)) preempted Jewett’s state law claims.

Judgment was entered, and Jewett timely appealed from the judgment.

DISCUSSION

I. Standard of Review

“Our Supreme Court has set forth the standard of review for ruling on a demurrer dismissal as follows: ‘On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed “if any one of the several grounds of demurrer is well taken. [Citations.]”’” (*Payne v. National Collection Systems, Inc.* (2001) 91 Cal.App.4th 1037, 1043.)

II. Jewett Cannot State a Claim for Deceptive or Unfair Business Practices

The trial court sustained the demurrer without leave to amend on the grounds that Jewett’s claims are preempted by the FCRA. Similarly, on appeal, the parties spend most of their time addressing whether Jewett’s claims are federally preempted. We need not resolve this complex legal issue. As a matter of law, Jewett has not stated a claim for deceptive or unfair business practices because Capital One’s credit card solicitations are not deceptive or misleading. Thus, we affirm the trial court’s order sustaining Capital One’s demurrer. Furthermore, because Jewett has not demonstrated how she could state such a claim, leave to amend properly was denied.

According to her complaint, Jewett contends that Capital One’s solicitations are misleading because they “1) deceive consumers as to the level of credit they have been approved for and are being offered, 2) induce consumers to apply for credit cards for

which they would not apply if they were aware that they would receive a credit card with substantial fees and only a \$200 credit limit, 3) induce consumers to apply for credit cards for which the amount of charges and fees are unfair and disproportionately high compared to the amount of credit that is granted, and 4) generate income for Capital One in the form of fees and charges which are completely disproportionate to the amount of credit advanced by Capital One.” Quite simply, Capital One’s solicitations are not deceptive as a matter of law by both their express terms and pursuant to the FCRA.

As Jewett readily concedes, Capital One’s credit solicitations constitute “firm offers of credit,” governed by the FCRA. A “firm offer of credit” is defined by the FCRA as “any offer of credit . . . to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer.” (15 U.S.C. § 1681a(l).) Under the 1997 amendments to the FCRA, a firm offer of credit may be further conditioned on information bearing on creditworthiness. (15 U.S.C. § 1681a(d)(1); see also *Kennedy*, *supra*, 369 F.3d at pp. 840-841.) “Thus, a creditor must honor a firm offer of credit only if, based on information in the consumer report, the application, or other information bearing on credit worthiness, the consumer meets the criteria initially used to select that consumer for the offer.” (*Kennedy*, *supra*, at p. 840.)

“Consumer reporting agencies, however, are only permitted to furnish limited information for a credit transaction not initiated by the consumer. By permitting a creditor to obtain limited information, the [FCRA] allows creditors, like banks, to pre-screen potential customers. In the pre-screening process, credit reporting agencies compile lists of customers who meet specific criteria provided by the creditor, and then provide the lists to a creditor, who uses the lists to solicit customers with firm offers for credit in the form of pre-approved offers of credit. To access more detailed information to determine whether the consumer meets a creditor’s specific criteria bearing on credit worthiness, a creditor must obtain a consumer’s authorization. Thus, acceptance of a pre-approved offer of credit typically requires the consumer’s agreement to permit the creditor to access the consumer’s credit information. If a consumer responds to a pre-

approved offer of credit, and authorizes the creditor to access the consumer's credit report, the creditor may then access the consumer's credit report to determine whether the consumer satisfies its previously-established [criteria] for credit worthiness. As a result, the [FCRA] permits a creditor to make a 'conditional' firm offer of credit; that is, an offer that is conditioned on the consumer meeting the creditor's previously-established criteria for extending credit." (*Kennedy, supra*, 369 F.3d at pp. 840-841, fns. omitted.)

That is exactly what occurred here. Capital One sent out credit card solicitations, such as the ones attached as exhibits to Jewett's complaint. Those solicitations constitute "'conditional' firm offers of credit," conditioned upon the consumer's satisfaction of certain criteria bearing on creditworthiness. (*Kennedy, supra*, 369 F.3d at p. 841.) Because these offers are conditioned upon creditworthiness by definition, they cannot be deceptive.

Bolstering our conclusion is the consumer's acknowledgment, in writing,³ of the conditions to the provision of credit. The only way in which Capital One could obtain information bearing on a consumer's creditworthiness was for the consumer to sign the application, granting Capital One access to that consumer's credit information. That document, which Jewett signed, expressly provides that the "offer is based on an initial assessment that [the recipient] met Capital One's credit standards," that the recipient's credit line "will be determined after Capital One receives [the] Acceptance Certificate," that the recipient "may be ineligible," and that Capital One "maintains the right not to open [an] account" if the recipient "no longer meet[s] Capital One's standards for creditworthiness." The solicitation further provides: "Grant of this offer, after you respond to it, is conditioned upon your satisfying the creditworthiness criteria used to select you for the offer and upon your satisfying any applicable criteria bearing on your creditworthiness." Having executed the application, the consumer is charged with having

³ The document provides: "I have read the enclosed IMPORTANT DISCLOSURES and Miscellaneous Information and agree to be bound as specified therein."

read and understood the terms of Capital One’s credit offer. (See, e.g., *Steinhebel v. Los Angeles Times Communications* (2005) 126 Cal.App.4th 696, 706.) It follows that Jewett (or any recipient) could not have been deceived by the solicitation.

In support of her theory that Capital One’s solicitations are misleading, Jewett directs us to certain provisions contained in the offer, namely the document’s reference to being “pre-approved” for a “Gold” card with a credit line of “up to \$2,000.” She ignores the fact that the word “Gold” is not deceptive either on its face or as pled in her complaint. Likewise, the solicitation does not guarantee a \$2,000 credit limit; it provides for a credit card of “up to” \$2,000. A credit limit of \$200 falls within Capital One’s offer of a credit limit of “up to” \$2,000 and is therefore not deceptive. Finally, as set forth above, “preapproving” a consumer for credit is exactly what is contemplated by the FCRA, as discussed in *Kennedy*.

Moreover, Jewett cannot pick and choose which portions of the solicitation she believes are deceptive. Rather, she must review the solicitation as a whole to evaluate whether it is misleading. Certainly a document that provides in plain terms that the amount of credit hinges upon the applicant’s creditworthiness is not deceptive as a matter of law.

DISPOSITION

The judgment of the trial court is affirmed. Capital One is entitled to costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ